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SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

No. 402.

THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

Motion of
Motion to Dismiss.

MOTION TO DISMISS, NOTICE, AND BRIEF IN SUPPORT OF MOTION.

M. S. GUNN,
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J. H. RALSTON,
Attorneys for Defendant in Error.

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SUPREME COURT OF THE UNITED STATES.

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THE MONTANA MINING COMPANY, LIMITED,
Plaintiff in Error,
vs.
THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA,
Defendant in Error.

Notice of Motion to Dismiss.

MESSRS. W. E. CULLEN, C. J. HUGHES AND A. B. BROWNE,
Attorneys for Plaintiff in Error:

Please take notice that the defendant in error will, on Monday, the 10th day of December, 1906, at the hearing of the above-entitled cause, move the Court to dismiss the writ of error in said cause. The motion which will be made and brief in support of same are hereto attached.

Dated this 4th day of December, A. D. 1906.

M. S. GUNN,
ARTHUR BROWN,
J. H. RALSTON,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

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Defendant in Error.
} *Motion to Dismiss.*

Comes now the defendant in error in the above entitled cause and moves this court to dismiss the writ of error herein for the reason that the jurisdiction of the circuit court was dependent entirely upon the fact that the plaintiff in error is an alien and the defendant in error a citizen of the United States, on account of which the judgment of the Circuit Court of Appeals in and for the Ninth Circuit, in said cause, is final.

Dated this 6th day of December, 1906.

M. S. GUNN,
ARTHUR BROWN,
J. H. RALSTON,
Attorneys for Defendant in Error.

SUPREME COURT OF THE UNITED STATES.

October Term, 1906.

THE MONTANA MINING COMPANY, LIMITED, *Plaintiff in Error*, *vs.* THE ST. LOUIS MINING AND MILLING COMPANY OF MONTANA, *Defendant in Error*.	*No. 402.*

BRIEF IN SUPPORT OF MOTION TO DISMISS.

The purpose of this action is to recover the value of certain ore, which was owned and possessed by plaintiff, defendant in error in this court, and converted by defendant, plaintiff in error here, to his own use.

Stone v. *United States*, 167 U. S. 179.

The case just cited was for the recovery of the value of trees cut upon the public domain. In the opinion the Court said:

> "It is contended in behalf of Stone that as the lands from which the trees were alleged to have been unlawfully cut are in Idaho, the action is local to the state, and the district court of the United States for the district of Washington was without jurisdiction. *Ellenwood* v. *Marietta Chair Co.*, 158 U. S. 105, is cited as an authority for this proposition. But that case proceeded upon the

theory that the allegations of the petition, at the time it was tried, presented a single cause of action, in which the trespass upon the land was the principal thing, and the conversion of the property was incidental only, and, therefore, that the entire cause of action was local. In the present case the petition, it is true, avers that the United States was the owner of the lands from which the trees were cut, but the gravamen of the action was the conversion of the lumber and railroad ties manufactured out of such trees, and a judgment was asked, not for the trespass, but for the value of the personal property so converted by the defendant. The description in the petition of the lands and the averment of ownership in the United States were intended to show the right of the government to claim the value of the personal property manufactured from the trees illegally taken from its lands."

In the case at bar the plaintiff does not make any claim for damages because of the trespass, but judgment is demanded for the value of the ore, which it is alleged was converted by defendant.

The case was tried upon the theory that it is an action to recover the value of ore converted. This appears from the evidence introduced and from the instructions to the jury as to the measure of damages.

The statutory law of the State of Montana requires that the complaint shall contain "a statement of the facts constituting the cause of action, in ordinary and concise language." *Code Civ. Proc.*, sec. 671. This was also the law when the action was commenced. *Comp. Stats.*, div. 1, sec. 85.

The law of a state relating to the pleadings in a case applies to actions at law in the Circuit Court of the United States for such state. Sec. 914, *U. S. Rev. Stats.*

The statement of the claim or cause of action of the plaintiff required the following allegations: (1) Ownership and possession of the ore by plaintiff, (2) conversion of such ore by defendant, and (3) the value of the ore. All other allegations are surplusage. The allegation of ownership is the allegation of an ultimate fact. The source of title is a matter of evidence.

If the plaintiff had, in stating its claim or cause of action, alleged ownership and possession, instead of pleading the

evidence from which ownership and possession are inferred, and, upon the trial, when the evidence was introduced, the defendant had demurred to the evidence or moved for a nonsuit, and the decision of such demurrer or motion had involved the decision of a federal question, the judgment of the Circuit Court of Appeals would undoubtedly have been final. Can a party, by pleading evidence, in violation of the law of pleading, introduce into the statement of his claim or cause of action a federal question which would not otherwise appear in the case until the answer is filed or a trial is had, and thereby secure the right to invoke the jurisdiction of this court? The act of congress conferring jurisdiction upon this court was framed with reference to the rules of pleading prescribed by law. The jurisdiction of this court depends upon the statement of the plaintiff's claim in the mode required by the law of pleading. If this were not true, the parties might agree that the plaintiff would, in stating his claim, state the evidence in support of the claim made and the facts relied upon as a defense, and thereby confer jurisdiction upon this court over a case in which the federal question would otherwise be presented by the answer or at the trial. If such a practice is permissible, it must be admitted that jurisdiction can be conferred by consent of the parties.

Many attempts have been made to bring cases within the jurisdiction of this court by incorporating into the pleading from which the question of jurisdiction must be determined, allegations which were not necessary to the statement of the plaintiff's claim, but they have all been unsuccessful.

In the opinion in the case of *Joy* v. *St. Louis*, 201 U. S. 332, it is said:

> "The case is a pure action of ejectment, and the general rule in such actions, as to the complaint, is, that the only facts necessary to be stated therein, are, that the plaintiff is the owner of the premises described, and entitled to the possession, and that defendant wrongfully withholds such possession, to the plaintiff's damage in an amount stated. Setting out the source of the plaintiff's title, as was done with so much detail in this case, was unnecessary, but it does not alter the case, because a

claim that the title comes from the United States does not, for that reason merely, raise a federal question.

"It is a long-settled rule, evidenced by many decisions of this court, that the plaintiff can not make out a case as arising under the constitution or laws of the United States unless it necessarily appears by the complaint or petition or bill in stating plaintiff's cause of action. In *Little Fork Gold-Washing & Water Co.* v. *Keyes*, 96 U. S. 199-203, it was said that before the circuit court can be required to retain a case under its jurisdiction, under section 5, act of 1875, it must, in some form, appear upon the record, by a statement of facts in legal and logical form, such as is required in good pleading, that the suit is one which really and substantially involves a dispute or controversy as to a right which depends upon the construction or effect of the constitution, or some law or treaty of the United States. That was a case of a petition for a removal of a suit from the State to the federal court But it has been held that whether there is a right of removal in such cases depends upon whether the circuit court could have exercised original jurisdiction."

In the opinion in the case of *Boston & Montana Consolidated Copper and Silver Mining Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 632, it is said:

"It is quite plain that the various averments contained in the complainant's bill for the purpose of showing jurisdiction in the circuit court are wholly unnecessary in order to make out complainant's cause of action for the conversion of ore by the defendants on premises belonging to the complainant."

In the same opinion it is said:

"The cases hold that to give the circuit court original jurisdiction, the federal question must appear necessarily in the statement of the plaintiff's cause of action, and not as mere allegations of the defense which the defendants intend to set up, or which they rely upon."

In the opinion in the case of *Western Union Telegraph Co.* v. *Ann Arbor Railroad Co.*, 178 U. S. 239, it is said:

"And it must appear on the record, by a statement in legal and logical form, such as is required in good plead-

ing that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States before jurisdiction can be maintained on this ground."

In the opinion in the case of *Florida Central & Peninsular Railroad Co.* v. *Bell*, 176 U. S. 330, this court said:

> "It has been several times held by this court that the plaintiff, if the statement of his own claim does not disclose a federal question, can not create jurisdiction in a circuit court by anticipating the defendant's claim and by alleging that the defendant will set up a defense under some law of the United States."

In the opinion in the case of *Third Street Railroad Co.* v. *Lewis*, 173 U. S. 458, it is said:

> "It is thoroughly settled that under the Act of August 13, 1888, the Circuit Court of the United States has no jurisdiction, either original or by removal from a State court of a suit as one arising under the constitution, laws or treaties of the United States, unless that appears by the plaintiff's statement to be a necessary part of his claim."

See further:

Devine v. *Los Angeles*, 202 U. S. 313.
Empire State, etc. Co v. *Mining Co.*, decided by this court at the October term, 1905.
Boston, etc., Mining Co. v. *M O. P. Co.* 188 U. S. 630.
State of Tennessee v. *Union Planters Bank*, 152 U. S. 453.

The allegation of ownership and possession of the vein from which the ore was extracted was unnecessary, as already shown. This allegation, however, was merely for the purpose of showing ownership and possession of the ore. In the case of *Stone* v. *United States*, 167 U. S. 179, the court, in the opinion, said:

> "The description in the petition of the lands and the averment of ownership in the United States were intended to show the right of the government to claim the value of the personal property manufactured from the trees illegally taken from its lands."

In the case of *Swift* v. *Jones*, 7 N. W. 656, which was an action to recover the value of lumber made from logs cut from the plaintiff's land, the Supreme Court of Wisconsin said:

> "Instead of averring ownership of the lumber directly, the plaintiff avers that it came from the logs cut on his land in the state of Michigan, which is an indirect yet a substantial averment of such ownership; or, in other words, the plaintiff pleads evidence of title to the lumber, instead of the legal conclusion of title from such evidence. Such a pleading is informal and inartistic, but when liberally construed, which is now the rule, it must be held substantially sufficient."

If the action is considered as an action to recover damages for the trespass upon the vein, it was not necessary to allege ownership and possession of the mining claim. The statement of ownership and possession of the mining claim, and that the vein has its apex within the surface boundaries of such claim is a statement of matters of evidence in support of the allegation of ownership and possession of the vein. But however this may be, the alleged federal questions are disclosed by the description of the vein with reference to the mining claim. It was wholly unnecessary, in stating the plaintiff's claim, to describe the vein by describing the apex thereof with reference to the surface boundaries of the mining claim. The allegation that the section of the vein from which the ore was extracted has its apex within the surface boundaries of the St. Louis claim, in connection with the allegation of ownership and possession of the St. Louis claim, would be a sufficient description and statement of ownership and possession of the vein.

Montana Mining Co. v. *St. Louis Mining & Milling Co.*, 102 Fed. 430.
Mining Co. v. *Cheesman*, 116 U. S. 533.

The plaintiff in its complaint in effect said that it was the owner and in possession of the ore, but that said ore was taken from a vein the apex of which enters and departs through the same side line, and for a distance the apex of the section of the vein from which the ore was taken is only partly within the surface boundaries of such mining claim, by reason of which the defendant disputes the claim of ownership and possession of said ore. In other words, the allegations in the complaint, which were not necessary to a statement of the plaintiff's claim, amount simply to a statement of what the defense would be.

In the case of the *Colorado Consolidated Mining Co.* v. *Turck*, 150 U. S. 138, it was claimed that the question "whether the patentees of a lode mining claim, whose discovery and patent were later than the date of another's patent, may follow his junior patented lode, the apex thereof being within his side line, into the other's patented ground on the dip," was a federal question. The court held that this question was not presented by the complaint. If the plaintiff in the case had alleged that the section of the vein in dispute was beneath the surface boundaries of the mining claim of the defendant, and that such claim was located and patented before the location of the plaintiff's mining claim, would this court have had jurisdiction? It is apparent that such allegations were not essential to a statement of the plaintiff's claim, and if we admit that such allegations would have presented a federal question, it must follow that the jurisdiction of the circuit court depends upon the manner of the statement of the claim or the allegations made, and not upon the nature of the claim itself or the allegations necessary to state such claim. In the case at bar there was no more necessity for the allegation with reference to the Nine Hour claim, or the description of the apex of the lode or vein from which the ore was taken, with reference to the eastern boundary of the St. Louis claim than there was in the Turck case for an allegation as to the ownership and date of location and patent of the mining claim beneath the surface of which the section of the lode in dispute was located.

If Federal questions were presented by the statement of the claim of plaintiff, the answer filed eliminated such Federal question from the case. In the answer all allegations of the complaint with reference to the description, ownership and possession of this lode or vein from which the ore was taken are denied, and the defense is based upon the conveyance of what is known as the "compromise ground."

In the opinion in the case of *Robinson* v. *Anderson*, 121 U. S. 522, the Court said:

> "Even if the complaint, standing by itself, made out a cause of jurisdiction, which we do not decide, it was taken away as soon as the answers were in, because if there was jurisdiction at all it was by reason of the averments in the complaint as to what the defenses against the title of the plaintiffs would be, and these were of no avail as soon as the answers were filed and it was made to appear that no such defenses were relied on."

In the case of *Boston & Montana Consolidated Copper & Silver Mining Co.* v. *Montana Ore Purchasing Co.*, 188 U. S. 630, this Court said:

> "Jurisdiction in this class of cases must be based upon the fact that the cause is one arising under the constitution or laws of the United States. If it appear to be such in the plaintiff's pleading simply because of the allegations as to what the defenses are on the part of the defendant, if when the answer comes in it is seen that no such defense in fact is set up or insisted upon, it is then seen that no such cause exists as stated in the complaint, and no jurisdiction therefore exists to try questions which are not of a kind coming within the statute, and the Court should then dismiss for want of jurisdiction."

Whether or not the questions arising from the situation of the apex of the vein from which the ore was taken with reference to the eastern boundary line of the St. Louis claim are Federal questions, is considered in the brief filed in support of

the motion to dismiss the application for mandamus made in the case, and was argued on the hearing of such motion.

Respectfully submitted,

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Attorneys for Defendant in Error.